Supreme Court, U.S.
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No. 95-1031

In the
Supreme Court of the United States
October Term, 1995

JAMES A. GHENT, JR.,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TONY E. GALLEGOS, GILBERT F. CASELLAS, CORRADO GIGANTE, STATE OF NEW JERSEY, SUPREME COURT OF NEW JERSEY, ROBERT D. LIPSHER, FEE ARBITRATION COMMITTEE DISTRICT IX, ANTHONY BENEVENTO, ROBERT C. LASALLE, MARY E. MARBAN, THOMAS ZICCARDI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Third Circuit correctly applied Borelli v. City of Reading as controlling the scope of appellate review under 28 U.S.C. §1291.

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STATEMENT OF FACTS

On November 29, 1994, Petitioner filed a civil rights complaint in the United States District Court in Newark, New Jersey alleging that the Fee Arbitration Committee of the Supreme Court of New Jersey violated his civil rights in failing to award him a fee to which he was entitled. The Petitioner argued that he was unlawfully discriminated

against in his employment by the Fee Arbitration Committee in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C §2000e.

Acting on a Motion to Dismiss filed by the Fee Arbitration Committee, which argued that the complaint failed to state a claim to which relief could be granted, the district court dismissed the complaint finding that the Fee Arbitration Committee was entitled to absolute immunity from liability, and moreover, that Petitioner had failed to establish any employment relationship as required for a Title VII claim. The court went on to note that the dismissal was without prejudice to the Petitioner's right to redraft the defective pleadings to state a valid claim.

SUMMARY OF ARGUMENT

Petitioner argues that this Court should grant his Petition for a Writ of Certiorari because the Third Circuit incorrectly relied on Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976) in dismissing his appeal for want of jurisdiction because the district court Order was not a final/appealable order. Petitioner's argument is entirely lacking in merit and his petition should be denied.

Contrary to Petitioner's contention, Borelli is directly on point and clearly dispositive of the issue at bar. The Borelli opinion found that "an order which dismisses a complaint without prejudice is neither final nor appealable because the deficiency may be corrected by the plaintiff without affecting the cause of action. Only if the plaintiff cannot amend or declares his intention to stand on the complaint does the order become final and appealable." Borelli, 532 F.2d at 951. Moreover, neither the facts of this case nor the cases cited by the Petitioner support his argument that his particular case represents the "narrow" exception to this general rule.

Therefore, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE THIRD CIRCUIT WAS CORRECT IN DISMISSING PETITIONER'S APPEAL FOR WANT OF JURISDICTION AND THERE IS NO COMPELLING REASON FOR FURTHER REVIEW BY THIS COURT.

Petitioner's challenges the Third Circuit's dismissal of his appeal for want of jurisdiction arguing that the appellate court incorrectly applied Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976) as controlling the scope of appellate review under 28 U.S.C. §1291. Petitioner argues that the cases of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949), Digital Equipment Corp. V. Desktop Direct, Inc., __ U.S. __, 114 S.Ct. 1992 (1994) and Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979) are contrary to the Borelli decision and, therefore, he was entitled to appellate review of the district court's decision in the court of appeals. Petitioner's position is without merit.

Title 28 U.S.C. §1291 provides for appeals only "from all final decisions of the district courts." In Borelli, the district court dismissed the complaint finding that the plaintiff lacked standing because she did not articulate the harm she had suffered. The Court of Appeals for the Third Circuit noted that if the allegations in the complaint were not sufficient, the trial court could require more particularized allegations through amendment to the complaint. The Court of Appeals went on to note that, "Although the district court's order did not mention amendment, an implicit invitation to amplify the complaint is found in the phrase "without prejudice." Borelli, 532 F.2d at 951. The Court then stated the well established proposition that "an order which dismisses a complaint without prejudice is neither final nor

appealable because the deficiency may be corrected by the plaintiff without affecting the cause of action. Borelli, supra.

The case at bar is indistinguishable from Borelli. The Petitioner failed to allege with sufficiency the alleged employment relationship between himself and the Fee Arbitration Committee. The district court dismissed the complaint without prejudice with the implicit invitation to the Petitioner to amend his complaint. Consequently, the district court's decision was non-final and not appealable under 28 U.S.C. §1291. Therefore, the Third Circuit's dismissal of Petitioner's appeal was correct in all respects.

Petitioner's citations to Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949); Digital Equipment Corp. V. Desktop Direct, Inc., _ U.S. __, 114 S.Ct. 1992 (1994); and Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979), do not support his argument that his case represents the narrow exception to the general rule that only final orders are appealable.

In Cohen, the Supreme Court noted that if the dismissal of the appeal did not go to the merits of the case and that the rights conferred by the statute, if applicable, could have been irreparably lost, appellate review of a non-final order may be appropriate. The Court noted, however, that its decision falls within that "small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action ... and too independent of the cause itself.." Cohen, 69 S.Ct. at 1225-6. Here, the dismissal by the district court did not go to the merits of the case and Petitioner's constitutional rights under Title VII would clearly not be irreparably lost. Moreover, the district court's decision did not determine claims separable and independent of the cause itself.

Therefore, Cohen and the present case are distinguishable and Cohen supports the Third Circuit's application of Borelli.

Petitioner's reliance on Digital and Forsyth is also misplaced. In Digital, the Court stressed that the narrow exception to the final order rule should remain narrow and never be allowed to swallow the general rule. The decision went on to note the stringent requirements of the collateral order rule. Digital Equipment Corp. 114 S.Ct. at 1996. The Court firmly noted that cases involving an important question which would be effectively unreviewable upon final judgment would be the only cases that fall into the narrow exception to the final order rule. Digital Equipment Corp. supra. Clearly, Petitioner's argument does not present any important questions which would be unreviewable upon final judgment. In Forsyth, the Third Circuit stresses that the Cohen collateral order doctrine requires claims of rights separable and independent from the rights asserted in the action. Forsyth, 599 F.2d at 1207.

Since Petitioner's argument neither presents nor represents any of the narrow exceptions cited above, his case falls squarely within the general rule that only final orders are appealable. Therefore, the Third Circuit correctly applied Borelli v. City of Reading and properly dismissed Petitioner's appeal for want of jurisdiction.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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